

**HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE
And
HON'BLE SHRI JUSTICE C.V. NAGARJUNA REDDY**

Writ Appeal No.1061 of 2005

Between:

Bharat Sanchar Nigam Limited,
Government of India Enterprise,
Rep. By its Chairman and
Managing Director and four others.

... Appellants

AND

The Sinclair Infra Tech Limited
Rep. By its authorized Signatory,
Sri B.V. Rama Rao, Hyderabad.

... Respondents

::JUDGMENT::

Counsel for the Appellants: Shri Sukumar Pattijoshi with Shri
R.S. Murthy

Counsel for Respondent: None

-
-
October 09, 2006

Per G.S.Singhvi, CJ

This appeal is directed against order dated 28-2-2005 passed by
the learned Single Judge whereby he allowed the writ petition filed by

the respondent and quashed the condition embodied in Advance Purchase Order (APO) dated 28-7-2004 issued by the concerned officer of Bharat Sanchar Nigam Limited (for short, 'BSNL') and directed the non-petitioners (appellants herein) to act strictly in accordance with the terms and conditions specified in the bid document.

The Facts:

In furtherance of tender notice dated 31-7-2002 issued by the competent authority of BSNL for supply of STM-1 SDH equipment, the respondent and others submitted their respective bids. The same were opened on 3-10-2002. The bid of Semi Conductors Complex Limited, Chandigarh, a Government of India enterprise was found to be the lowest and that of the respondent was found to be second lowest. Accordingly, both the parties were awarded contract for supply of the equipment. As per the conditions embodied in the bid document, the concerned authority asked the respondent to supply 25% of the total quantity of the equipment valued at Rs.1,28,74,410.54 ps. After completion of supply, the concerned authority of BSNL finalized the price of 25% of the equipments. This was communicated to the respondent vide letter dated 29-6-2004.

One of the multi-national companies, which was awarded contract under Clause 15-A of Section IV of the bid document, could not supply the equipments. Therefore, while placing APO for the remaining 75% quantity, the concerned authority asked the respondent to supply additional quantity and fixed the tentative price at Rs.4,78,80,271/-. The respondent agreed to supply the balance 75% quantity of the equipment along with additional quantity, but raised an objection to the following clause contained in APO dated 28-7-2004:

“The prices shall be finalized with the budgetary impact of

regular budget announced for the year 2004-05 or the approved prices of new tender to be opened during 2004-05, on whichever is on lower side”

The respondent sent letter dated 16-8-2004 contending that the aforementioned clause was not applicable to its case and the terms and conditions of supply should be regulated by tender notice dated 31-7-2002. The relevant portion of the letter sent by the respondent reads as under:

“However, on scrutiny of the APO terms and conditions, it is found that in the 2nd part of clause-3 (i), the contract prices are restricted to those obtained in the new tender of 2004-05. This is not applicable in our case as they are totally governed by conditions of Tender Enquiry under reference-1 (T.E.No.MM/OF/ 072002/000247 dated 31.07.2002) above. Such condition of restricting price of a contract under a previous Tender based on un-established prices to be obtained in future tenders is neither in the scope of the Tender documents nor in the procurement policy.”

The concerned authority of BSNL did not accept the contention of the respondent and sent letter dated 25-8-2004 to justify the incorporation of the new price clause in the APO and also called upon the respondent to convey its acceptance within seven days. For the sake of convenience, the relevant extracts of letter dated 25-8-2004 are reproduced below:

“Kindly refer to the above mentioned captioned Advance Purchase Order and your acceptance of APO under reference. The New tender for the procurement of STM-1 SDH equipment in BSNL has been opened on 18.08.2004. Due to the decreases in unit prices (all exclusive) of all the items, the provisional unit prices of each item of the said APO is hereby revised as shown in the enclosed annexure. These provisional prices are the 90% of the L-1 quoted price against the New

Tender Enquiry No.MM/OF/062004/000270 opened on 18.08.2004. During the original delivery period, the final prices of STM-1 SDH equipment shall be the approved prices of the last tender opened on 03.10.2002 with budgetary impact as on date or the approved prices of New tender opened on 18.08.2004, whichever is on lower basis.

You are requested to convey your unconditional/ unequivocal acceptance of the revised provisional unit prices (all inclusive) in respect of the above said APO within Seven days i.e. up to 31.08.2004, failing which the said APO shall be withdrawn.

All other terms and conditions of the said APO shall remain unaltered.”

After some correspondence in which the appellants and the respondent stuck to their respective stands, the latter filed writ petition under Article 226 of the Constitution of India, which was registered as Writ Petition No.19454 of 2004. It was pleaded by the respondent that the non-petitioners do not have the power to suo motu alter the conditions of bid and reduce the price of the equipment. According to the respondent, the authorities of BSNL were bound by the terms and conditions embodied in the bid document and it cannot be compelled to agree to supply equipments at lower price.

In the counter filed on behalf of the non-petitioners (appellants herein), two preliminary objections were raised to the maintainability of the writ petition. The first objection was that this Court does not have the jurisdiction to entertain the petition because the cause of action or even a part thereof did not arise within the territory of the State of Andhra Pradesh. The second objection was that an effective alternative remedy is available to the petitioner (respondent herein) by way of arbitration and, therefore, the writ petition is liable to be dismissed.

The learned Single Judge over-ruled the aforementioned objections and granted relief to the respondent by observing that BSNL cannot deviate from the tender condition and insist on supply of equipment at a lower price.

Shri Sukumar Pattijoshi, learned counsel for the appellants reiterated the objections to the maintainability of the writ petition and argued that the learned Single Judge committed a serious error by entertaining the writ petition and granting relief to the respondent. Shri Joshi relied on the judgments of the Supreme Court in **State of Rajasthan v. Swaika Properties**^[1]; **Oil & Natural Gas Corporation v. Utpal Kumar Basu**^[2], **M/s. Kusum Ingots & Alloys Ltd. v. Union of India**^[3], **Navinchandra N. Majitha v. State of Maharashtra**^[4] and of this Court in **MIC Electronics Ltd. v. Union of India**^[5] and argued that the learned Single Judge could not have entertained the writ petition because the cause of action did not arise within the territory of the State of Andhra Pradesh. He then argued that even if this Court comes to the conclusion that objection to the territorial jurisdiction of this Court is not tenable, the order under challenge is liable to be set aside because the view taken by the learned Single Judge on the issue of alternative remedy is contrary to the law laid down by the Supreme Court in **State of U.P. v. Bridge & Roof Company (India) Ltd.**^[6], **Kerala State Electricity Board v. Kurean E. Kalathil**^[7], **State of Jammu & Kashmir v. Gulam Mohd. Dhar**^[8] and **State of Bihar v. Jain Plastics and Chemicals Ltd.**^[9].

We have given serious thought to the arguments of the learned counsel. For deciding the question relating to territorial jurisdiction of

this Court, it will be useful to notice Article 226 (2) of the Constitution, which reads as under:

“226. Power of High Courts to Issue certain writs:

...

2) The power conferred by Cl. (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.”

The expression “cause of action” has not been defined in the above reproduced article, but the same has been judicially interpreted to mean “that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court”. To put it differently, it means, ‘the bundle of facts which taken with the law applicable to them, gives the plaintiff a right to relief against the defendant – **Oil & Natural Gas Corporation v. Utpal Kumar Basu** (supra), **Union of India v. Adani Exports Ltd.**^[10], **National Textiles Corporation Ltd. v. Haribaksh Savalram**^[11], and **M/s.Kusum Ingots & Alloys Ltd. v. Union of India** (supra). In **Union of India v. Adani Exports Ltd.** (supra), the Supreme Court held:

“In order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application under Article 226 (2), as in the present case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. Each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court’s territorial jurisdiction unless those facts are such which have a nexus or relevance with the lis that is involved in the case.”

If the averments contained in the affidavit filed by the respondent are examined in the light of the proposition laid down in the aforementioned decisions, it becomes crystal clear that the cause of action or at least a part thereof arose within the territorial jurisdiction of this Court and the learned Single Judge did not commit any error by refusing to entertain this objection of the appellants. The relief claimed in the writ petition was essentially founded on the assertion that after having accepted the bid submitted pursuant to notice dated 31-7-2002, and placed APO for 25% of the total equipments which were duly supplied, the non-petitioners (appellants herein) cannot arbitrarily change the price clause and insist on supply of the equipments at a lower price. The facts pleaded in the affidavit filed in support of the writ petition shows that a part of the contract entered into between the parties had been executed and implemented with the supply of equipments by the writ petitioner. The establishment and factory of the petitioner is within the territorial extent of this Court. The payment made by BSNL was also received by the petitioner at Hyderabad. The grievance made in the writ petition emanated from communications dated 25-8-2004 vide which BSNL insisted on revision of the price clause and second communication dated 15-10-2004 sent by the concerned authority. Both these communications were received by the petitioner at Hyderabad. It is, thus, clear that the cause of action for filing the writ petition arose within the territory over which this High Court exercises jurisdiction.

In view of the above, we hold that the learned Single Judge rightly rejected the first objection raised by the non-petitioners (appellants herein) to the maintainability of the writ petition.

The question which remains to be considered is whether the writ petition should have been dismissed on the ground of availability of alternative remedy.

According to the appellants, the remedy of arbitration available to the respondent in terms of Clause 20.1 of the General Conditions of Contract is an effective alternative remedy and, as the dispute relating to the price of the equipments falls within the ambit of that clause, the learned Single Judge ought to have relegated the respondent to the remedy of arbitration. Shri Sukumar Pattijoshi referred to the arbitration clause contained in Clause 20.1 of Section III of the bid document and argued that the learned Single Judge gravely erred by entertaining the writ petition.

For proper appreciation of the contention raised on behalf of the appellants, Clause 20.1 of Section III of the bid document, which contains General (Commercial) Conditions of Contract, is reproduced below:

“20.1. In the event of any question, dispute or difference arising under this agreement or in connection therewith (except as to matters, the decision of which is specifically provided under this agreement), the same shall be referred to sole arbitration of the CMD, BSNL, New Delhi or in case his designation is changed or his office is abolished then in such case to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation such officer may be called (hereinafter referred to as the said officer) and if the CMD, BSNL or the said officer is unable or unwilling to act as such the sole arbitration or some other person appointed by the CMD, BSNL or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996.

There will be no objection to any such appointment on the ground that the arbitrator is a BSNL servant or that he has to

deal with the matter to which the agreement relates or that in the course of his duties as BSNL servant he has expressed views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reasons whatsoever, the CMD, BSNL or the said officer shall appoint another person to act as arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.”

The terminology used in the above reproduced arbitration clause shows that the ambit and scope thereof is very wide. It not only comprehends any question, dispute or difference arising under the agreement, but also question, dispute or difference arising in connection with the agreement. A reading of the correspondence entered into between the parties makes it clear that the dispute relating to the price clause had direct nexus between the agreement entered into between the parties. Therefore, the same could legitimately be referred for arbitration.

The remedy of arbitration available to the respondent has to be treated as an effective alternative remedy because it forms part of the conditions of bid and the contract entered into between the parties. While giving the bid, the respondent will be deemed to be aware of the fact that the dispute for differences arising under the agreement or in connection therewith was liable to be adjudicated by way of arbitration. It did not raise any objection to the incorporation of that condition. Therefore, the learned Single Judge was not justified in brushing aside the objection taken by the appellants to the maintainability of the writ petition on the ground of availability of alternative remedy.

It is trite to say that in exercise of power under Article 226 of the Constitution, the High Court can interfere even in contractual matters to which State or its instrumentality or its agency or any public authority is a party and if the action of the State or its instrumentality/agency is found to be arbitrary or contrary to public interest, then the Court can annul the same, but it is equally well-settled that in such matters the Court will be extremely slow to interfere in such matters. In **State of U.P. v. Bridge & Roof Co.(India) Ltd.**^[12], the Supreme Court was called upon to consider whether the rates quoted by the contractor were inclusive of the sales tax, if any, on the constructional plants, materials and supplies required for the purpose of execution of the contract. The respondent, who was awarded contract for rehabilitation and improvement of certain stretch of road in Uttar Pradesh applied to the Commissioner of Sales Tax, Uttar Pradesh for composition of tax liability. The Deputy Commissioner, Sales Tax, in exercise of the power delegated to him by the Commissioner, passed order dated 27-5-1992 that sales tax should be deducted at the rate of 1% at the time of payment of balance amount. After three years, the respondent filed writ petition in Allahabad High Court questioning the deduction of sales tax. The High Court did not go into the issue of maintainability of the writ petition, but disposed of the same by observing that the Government shall deduct only 1% of the bill in question up to 31-3-1995. While setting aside the High Court's order on merits, the Supreme Court held:

“15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e., in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of

the Deputy Commissioner made under the proviso to Section 8-D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

17. Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of sub-clause (4) of clause 70 of the contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the civil court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the civil court, as the case may be, according to law. Similarly if the Government says that any overpayment has been made to the respondent, its remedy also is the same.

18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is

payable to it under the contract, was wholly misconceived and was not maintainable in law. (See the decision of this Court in **Asstt. Excise Commr. v. Issac Peter**^[13] where the law on the subject has been discussed fully.) The writ petition ought to have been dismissed on this ground alone.

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy — in this case, provided in the contract itself — is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 — whether for issuance of mandamus or any other writ, order or direction — was misconceived for the reasons mentioned supra.”

In **Kerala State Electricity Board v. Kurien E.Kalathil**^[14], the Supreme Court considered the issue relating to maintainability of the writ petition in a contractual matter. The facts of that case were that the appellant, State Electricity Board executed an agreement dated 16-9-1981 with the respondent contractor for construction of a dam. After the

commencement of the work, the State Government revised, by notification dated 30-3-1983, the minimum wages payable to employees employed in the works mentioned in the notification, w.e.f 1-4-1983. The respondent contractor claimed that he began making the revised payments to his workers as required for the period 1-4-1983. Till December 1984, the Board reimbursed the respondent contractor. However, from January 1985 the Board stopped making the payments for labour escalation, contending that construction of a dam was not covered by the notification dated 30-3-1983. This disagreement was settled when the Industrial Tribunal made an award on 14-10-1993, holding that the notification was applicable to dam construction (in case of workers employed for construction or maintenance of roads, or building operations and for stone-breaking or stone-crushing). The award became final. On 23-12-1994 the Board wrote the respondent demanding recovery with interest of Rs.3.65 crores, which had been paid in the form of advances for various heads of work. The respondent filed a writ petition seeking to have the letter of demand quashed and also praying for payment of the amounts paid in revised wages. While the petition was pending, the Board, by an order dated 26-2-1997 terminated the contract, which the contractor challenged by filing another petition. The High Court disposed of both petitions holding that the termination of the contract was arbitrary, unjust and not in public interest and directed the Board to pay the amounts claimed by the respondent along with interest at 18%. The Supreme Court partly allowed the appeal of the Board and held:

“The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is

violated, ordinarily the remedy is not a writ petition under Article 226. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.”

In **State of Jammu & Kashmir v. Ghulam Mohd. Dar**^[15], the Supreme Court reiterated the settled rule that a writ of mandamus should not ordinarily be issued for enforcing the terms and conditions of a contract.

In our opinion, the ratio of the above noted judgments squarely applies to the present case and the learned Single Judge committed a serious error by entertaining the writ petition.

In the result, the appeal is allowed. The order of the learned Single Judge is set aside and the writ petition filed by the respondent is dismissed with liberty to the said respondent to avail remedy by way of arbitration in terms of Clause (20) of the Agreement.

G.S.SINGHVI, CJ

C.V. NAGARJUNA REDDY, J

October 09, 2006

svs

[\[1\]](#) (1985) 3 SCC 217

[\[2\]](#) (1994) 4 SCC 711

[\[3\]](#) JT 2004 (Supp.1) SC 475

[\[4\]](#) (2000) 7 SCC 640

[\[5\]](#) unreported judgment in Writ Appeal No.1807 of 2004 dt.22-11-2004

[\[6\]](#) (2000) 6 SCC 293

[\[7\]](#) (2000) 6 SCC 293,

[\[8\]](#) (2004) 12 SCC 327

[\[9\]](#) (2002) 1 SCC 216

[\[10\]](#) (2002) 1 SCC 567

[\[11\]](#) (2004) 9 SCC 786

[\[12\]](#) (1996) 6 SCC 22

[\[13\]](#) (1994) 4 SCC 104

[\[14\]](#) (2000) 6 SCC 293

[\[15\]](#) (2004) 12 SCC 327